No. 01-1099

Supreme Court, U.S.
FILED
FEB 27 2002

In The

Supreme Court of the United States

MICHAEL ERIKSON,

Petitioner,

v.

PAWNEE COUNTY, an Oklahoma political subdivision, ex rel. BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY; LARRY STUART, in his official capacity as District Attorney for Osage and Pawnee Counties; HARLAND STONECIPHER, individually and as President of the Oklahoma Sportman's Association, OKLAHOMA SPORTMAN'S ASSOCIATION; MICHAEL TURPEN, individually and as an employee and shareholder of the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc.; RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, INC., an Oklahoma professional corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT PAWNEE COUNTY'S BRIEF IN OPPOSITION

JAMES L. GIBBS, II,
OK No. 15689
Counsel of Record
COLLINS, ZORN, WAGNER & GIBBS, P.C.
429 N.E. 50th Street,
Second Floor
Oklahoma City, Oklahoma
73105
Telephone: (405) 524-2070
Facsimile: (405) 524-2078

ROBERT E. APPLEGATE,
OK No. 17376
COLLINS, ZORN, WAGNER & GIBBS, P.C.
429 N.E. 50th Street,
Second Floor
Oklahoma City, Oklahoma
73105
Telephone: (405) 524-2070
Facsimile: (405) 524-2078

Attorneys for Respondent Pawnee County, an Oklahoma political subdivision, ex rel. Board of County Commissioners of Pawnee County

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

138

QUESTIONS PRESENTED FOR REVIEW

Petitioner Michael Erikson (Plaintiff in the underlying lawsuit, hereinafter "Petitioner") presents two questions for the Court's review. First, Petitioner asks whether the dismissal of his cause of action violates his rights pursuant to the Due Process Clause of the Fifth Amendment and is contrary to the Court's decision in *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998). Second, Petitioner asks whether a district court may dismiss a civil rights complaint without granting leave to amend.

LIST OF PARTIES

As Petitioner has failed to suggest otherwise, the caption of this case apparently identifies the names of the parties to this proceeding. However, the Respondent Pawnee County (hereinafter "Respondent County") contends that it is not a party to this proceeding.

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Official and Unofficial Reports of the Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations 2

Statement of the Case 2

Argument and Authority 4

Conclusion 7

TABLE OF AUTHORITIES

Page

CASES

Arnold v. McClain, 926 F.2d 963 (10th Cir. 1991) 5, 7

Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998).....i

Laidley v. McClain, 914 F.2d 1386 (10th Cir. 1990) ...5, 7

STATUTES

Federal Rules of Civil Procedure 12(b)(6).....2, 4

28 U.S.C. § 1254..... 1

28 U.S.C. § 1331..... 1

28 U.S.C. § 1343..... 1

28 U.S.C. § 1367..... 1

Okla. Stat. Ann. tit. 19, § 215.4 5

Okla. Stat. Ann. tit. 19, § 215.28 5

Okla. Stat. Ann. tit. 19, § 215.30 5

Okla. Stat. Ann. tit. 19, § 215.31 5

OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS BELOW

Petitioner's request for review in this matter concerns the decision of the United States Court of Appeals for the Tenth Circuit in *Erikson v. Pawnee County Board of County Commissioners*, 263 F.3d 1151 (10th Cir. 2001). Petitioner's original cause of action was dismissed by the United States District Court for the Northern District of Oklahoma on August 21, 2000, in *Erikson v. Pawnee County, et al.*, Case No. 99-CV-786-BU(M), and was not reported.

STATEMENT OF JURISDICTION

Petitioner has asserted jurisdiction in this proceeding pursuant to 28 U.S.C. § 1254. Petitioner originally brought his cause of action against the Respondent County and others pursuant to 28 U.S.C. §§ 1331, 1343 and 1367 based upon alleged violations of his constitutional rights and state tort claims.

As described fully herein, the Respondent County asserts that jurisdiction is not proper with respect to any claims advanced against it by Petitioner in the underlying lawsuit. Specifically, Petitioner has failed to object to, let alone appeal, any decision by the District Court concerning the dismissal of the Respondent County.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

As asserted in the Petition for Writ of Certiorari, Petitioner's cause of action is premised upon alleged violations of his constitutional rights and state tort claims. Additionally, Petitioner suggests that the dismissal of his cause of action violates his due process rights pursuant to the Fifth Amendment. However, the present proceeding solely concerns whether the District Court properly dismissed Petitioner's lawsuit pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, which provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

STATEMENT OF THE CASE

Petitioner originally brought his cause of action against the Respondent County and other Defendants alleging that he was wrongfully charged and tried for the murder of two individuals. Specifically, Petitioner presented claims for malicious prosecution, malicious abuse of process, a violation of his Fourteenth Amendment constitutional rights, civil conspiracy, intentional infliction of emotional distress and punitive damages. (See

Petitioner's Petition for Writ of Certiorari, Appendix, pp. 34a-36a).

As described in United States Magistrate Judge Frank H. McCarthy's Report and Recommendation, Petitioner contends that on June 26, 1992, he shot and killed Fred Head, Jr. ("Head") and Tony McCollum ("McCollum") in self defense. (Petitioner's Petition for Writ of Certiorari, Appendix, pp. 14a-15a). Petitioner alleges that he was wrongfully charged with the murders of Head and McCollum as a result of pressure from Defendants not including the Respondent County. Petitioner complains that Defendant Oklahoma Sportman's Association raised funds to assist in his prosecution and certain monies were given to Defendant Michael Turpen, a private attorney, to assist in and ultimately conduct the prosecution.

In the Complaint, with respect to the Respondent County, Petitioner proposed that "Pawnee County officials," specifically, the Pawnee County District Attorney, Larry Stuart ("Stuart"), maliciously prosecuted him. (Petitioner's Petition for Writ of Certiorari, Appendix, p. 34a). In fact, throughout the Complaint, Petitioner interchanges "Pawnee County" for Stuart and the District Attorney's Office. Outside of his generic reference to Pawnee County in this regard, Petitioner presented no allegations concerning conduct of the Respondent County independent of the acts alleged on behalf of Stuart and the District Attorney's Office.

As a result, the Respondent County presented a Motion to Dismiss contending that it cannot be held liable for any actions of Stuart or the District Attorney's Office. While Petitioner concedes this fact, he complains that

someone contributed money to his prosecution and that *someone* could very well have been the Respondent County. (See Petitioner's Petition for Writ of Certiorari, Appendix, p. 52a). In his Report and Recommendation, Magistrate Judge McCarthy recommended the dismissal of Pawnee County pursuant to the authority advanced by the Respondent County, and conceded by Petitioner, and further determined that Petitioner's "vague allegations unsupported by any specific factual assertions against Pawnee County" were insufficient. (See Petitioner's Petition for Writ of Certiorari Appendix, p. 16a).

Petitioner appealed the dismissal of his cause of action to the United States Court of Appeals for the Tenth Circuit. In his Brief in Chief, Petitioner presented two issues: (1) whether the District Court properly found that Petitioner's factual allegations were insufficient pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and (2) whether the District Court erred in not granting leave for Petitioner to amend his Complaint to include Stuart in his individual capacity. Petitioner failed to present any objection to or issue for the Court of Appeals regarding the dismissal of the Respondent County. (See generally Petitioner's Petition for Writ of Certiorari, Appendix, pp. 1a-8a).

ARGUMENT AND AUTHORITY

On December 28, 1999, the Respondent County moved to dismiss Petitioner's claim against it based upon the fact that Petitioner's cause of action against the Respondent County concerns alleged actions of the

Pawnee County District Attorney. In Oklahoma, it is well settled that a district attorney is an arm of the state and, as such, the county cannot be held liable for the district attorney's alleged improper actions. *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990). In *Laidley*, the Court stated:

> The duties of the District Attorney are set forth generally in Oklahoma Statute Annotated Title 19, § 215.4 and are implemented by other state statutes. A District Attorney is to prosecute all actions for crime in his district and prosecute or defend civil actions in which any county in his district is interested. *Id.* The District Attorney's counsel, a state agency, pays all salaries and expenses of the office of District Attorney, including salary of the District Attorney, from state treasurery funds. *Id.* at § 215.28. All employees of the District Attorney serve at the pleasure of the District Attorney and are deemed to be state employees for all purposes. Id. at §§ 215.30 and 215.31.

Laidley at 1391. *See also Arnold v. McClain*, 926 F.2d 963, 965-966 (10th Cir. 1991).

In response to the Respondent County's Motion to Dismiss, Petitioner conceded that the Respondent County cannot be held liable for acts of the District Attorney. However, Petitioner suggested that his prosecution was funded by an unknown third party which *could have been* the Respondent County. In recommending that the Respondent County's Motion to Dismiss be granted, United States Magistrate Judge Frank H. McCarthy recognized that Petitioner's vague and unsupported allegations were not sufficient to withstand the Respondent

County's Motion to Dismiss. (See Petitioner's Petition for Writ of Certiorari, Appendix, p. 16a).

In his Brief in Chief to the Tenth Circuit, Petitioner abandoned his claim against the Respondent County or otherwise failed to properly appeal its dismissal. Rather, Petitioner spoke solely of the alleged actions of the District Attorney. In fact, outside of his generic references to the District Attorney as "Pawnee County," Petitioner presented no arguments concerning the Respondent County as the phantom third-party fundraiser for his prosecution. Accordingly, no such issue was addressed by the Tenth Circuit. (See Petitioner's Petition for Writ of Certiorari, Appendix, pp. 1a-8a).

The issues submitted to the Court in this proceeding similarly reflect Petitioner's abandonment of any objection to or appeal of the District Court's dismissal of the Respondent County. Rather, in his Petition for Writ of Certiorari, Petitioner only generally asserts that the District Court and Court of Appeals was incorrect in finding that his allegations were insufficient. In the Petition for Writ of Certiorari, Petitioner specifically provides:

> The adequacy of the Complaint concerns two *specific* allegations: **the claim that the *private defendants* motivated or controlled the prosecution; and the claim that officials lacked probable cause to pursue the *prosecution*.**

(Petitioner's Petition for Writ of Certiorari, p. 17) (Emphasis added). Moreover, the "two alleged pleading defects" referenced by Petitioner with respect to the second question for the Court's review do not concern any

allegations against the Respondent County. (See Petitioner's Petition for Writ of Certiorari, p. 20).

In any event, whether the Respondent County can be held liable, or more accurately, *potentially* liable, is beyond dispute pursuant to *Laidley* and *Arnold*. Petitioner has named the Respondent County as a Defendant solely for the conduct and actions of District Attorney Larry Stuart in his official capacity as District Attorney for Osage and Pawnee Counties. Petitioner has not asserted any claims against the Respondent County independent of the actions of the District Attorney. Accordingly, even assuming, *arguendo*, Petitioner has properly included the Respondent County in this proceeding, the District Court's dismissal of the Respondent County was nevertheless proper.

CONCLUSION

Petitioner has clearly failed to properly preserve any objection to the District Court's dismissal of the Respondent County. As discussed, Petitioner's Petition for Writ of Certiorari, as well as appeal to the Court of Appeals, is void of any argument or authority concerning the dismissal of the Respondent County. Rather, Petitioner has presented only two questions for the Court, neither of which concern whether the Respondent County can be held liable for acts of the District Attorney or whether Petitioner presented sufficient facts in support of his post-Complaint allegation that *someone, maybe the Respondent County,* contributed funds to his prosecution.

Accordingly, with respect to the Respondent County, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES L. GIBBS, II,
OK No. 15689
Counsel of Record
COLLINS, ZORN, WAGNER & GIBBS, P.C.
429 N.E. 50th Street,
Second Floor
Oklahoma City, Oklahoma
73105
Telephone: (405) 524-2070
Facsimile: (405) 524-2078

Attorneys for Respondent Pawnee County, an Oklahoma political subdivision, ex rel. Board of County Commissioners of Pawnee County

ROBERT E. APPLEGATE,
OK No. 17376
COLLINS, ZORN, WAGNER & GIBBS, P.C.
429 N.E. 50th Street,
Second Floor
Oklahoma City, Oklahoma
73105
Telephone: (405) 524-2070
Facsimile: (405) 524-2078

Attorneys for Respondent Pawnee County, an Oklahoma political subdivision, ex rel. Board of County Commissioners of Pawnee County